

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





75-7330

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 75-7330

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BAY POINT CORP.,

Plaintiff-Appellant,

against

REPUBLIC NATIONAL BANK OF NEW YORK,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

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BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

1. Was it proper to deny the plaintiff's motion for a voluntary discontinuance without prejudice?
  2. Was it proper to dismiss the action with prejudice under Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure for failure of a party to appear for a deposition?
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STATEMENT OF THE CASE

Nature of the Case

This is an appeal (i) from an order of the United States District Court for the Southern District of New York, Hon. Charles L. Brieant, Jr., entered on April 29, 1975, denying a motion of the plaintiff for voluntary dismissal without prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure and (ii) from a judgment of said court, entered on April 29, 1975, dismissing this action with prejudice, pursuant to Rules 37(b) and 41(b).

The plaintiff-appellant is the owner of a valuable tract of land in New Jersey, on which the defendant bank holds a subordinate mortgage. The action was commenced on April 30, 1973 in the United States District Court for the District of New Jersey (i) to compel the defendant bank to release from the lien of its mortgage lots of land, in accordance with the terms of the mortgage, (ii) to determine the amount due, if any, on the mortgage and (iii) for other relief. Jurisdiction is based on diversity of citizenship. Following the filing of the complaint, on motion of the defendant, the case was transferred on June 1, 1973 from the District of New Jersey to the Southern District of New York.

After this action was filed, the broker who arranged the sale of the property and who held a mortgage to secure his commission instituted a foreclosure proceeding in the Superior Court of the State of New Jersey naming both parties herein and others as defendants. On March 14, 1974, on consent of both parties herein and by order of Judge Brieant, this action was stayed and placed on the suspense docket of the District Court pending a determination by the New Jersey Superior Court in the foreclosure proceeding of the amount due, if any, on the defendant's mortgage, an issue which was also raised by the pleadings in this action.

On December 3, 1974, on the defendant's motion, despite the fact that the New Jersey Superior Court had not yet determined the amount due on the defendant's mortgage, the stay was vacated and this action was restored to the active docket of the District Court.

On January 30, 1975, on the defendant's motion, Judge Brieant entered an order restraining the New Jersey Superior Court from determining in the foreclosure proceeding the validity of the defendant's mortgage on the ground that such determination was an issue before the District Court in this action. The order also restrained the plaintiff and its counsel from proceeding in New Jersey as to any issues before the District Court. (A-89). This threw



the entire litigation into a state of confusion because no one could ascertain from Judge Brieant's order what was restrained and what was not or how it was possible to foreclose a mortgage without considering the validity, priority and amount of the various liens affecting the property. In addition, the restraining order had the effect of preventing the plaintiff from defending the New Jersey action while allowing the defendant to obtain full relief therein. (A-170 to A-172, A-180).

On February 28, 1975, the defendant moved for an order of contempt against the plaintiff in the New Jersey foreclosure proceeding, the plaintiff herein and their respective counsel, claiming that they were violating the District Court's restraining order with respect to the New Jersey action. To seek clarification, the plaintiff cross-moved for a reconsideration of the restraining order and was joined in this by the Attorney General of the State of New Jersey appearing on behalf of the New Jersey Superior Court. The defendant's contempt motion appears to have been withdrawn and no decision was made by the District Court on the plaintiff's motion for reconsideration of the restraining order. The situation became further confused by the extensive debate among Judge Brieant and various counsel in which he conceded the complexities of the litigation (A-220, A-225) but seemed to feel that somehow the plaintiff's counsel were

trying to deprive him of jurisdiction (A-12, A-16, A-194). Among other things he suggested that the plaintiff move for a voluntary dismissal without prejudice (A-218, A-220).

On April 3, 1975, the plaintiff moved for a voluntary discontinuance of this action without prejudice, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, on the grounds that events occurring subsequent to the commencement of this action, including the commencement in the State of New Jersey of several actions against the plaintiff in this action involving the same real property, had so altered the state of facts which existed at the time this action was brought, that the issues raised in this action either had become moot, were before the New Jersey Courts in the other actions against the plaintiff or, more importantly, could not be resolved until the resolution of the New Jersey actions. The District Court denied the plaintiff's motion on the ground that the plaintiff would not consent to dismissal with prejudice (A-232). This denial is one of the issues in this appeal.

The defendant bank had taken the deposition of the plaintiff through C. J. Achee, president of the plaintiff, once prior to the stay of this action on March 14, 1974 and once immediately after this action had been reactivated. Thereafter, the defendant tried to continue this deposition



but when Mr. Achee was available the defendant's counsel was not. When the defendant's counsel was finally available, Mr. Achee had gone abroad to negotiate a substantial loan and the defendant's counsel refused to consent to the substitution of another officer of the plaintiff.

When Mr. Achee was unable to appear on April 24, 1975, Judge Brieant ordered him to return within 96 hours on pain of dismissal of the case. Mr. Achee was unable to do so without exposing himself and others to severe financial risk and hardship. Judge Brieant refused to listen to any explanation of these circumstances (A-240) and on Mr. Achee's failure to return for the deposition, dismissed the suit with prejudice on April 28, 1975. This dismissal is the second issue in this appeal.

#### Statement of Facts

The subject of this action and the New Jersey litigation is a large tract in Ocean County, New Jersey, owned by the plaintiff. When the plaintiff acquired the property it delivered to the seller at the closing a purchase money mortgage in the amount of \$4,050,000. This mortgage was assigned on the same day to the defendant bank.

The plaintiff was successfully developing the property for residential purposes until blocked by what the

plaintiff claims was a breach of contract by the defendant bank in refusing to follow the provisions of its mortgage for releasing lots from the lien of the mortgage.

The mortgage contained provisions (i) permitting it to be subordinated to a new mortgage not to exceed \$3,300,000, (ii) allowing credits against the principal for expenditures made by the plaintiff in removing certain title objections, satisfying certain other obligations of the seller, and for a "fair price adjustment" if the seller lacked marketable title to any portion of the real property, and (iii) permitting the plaintiff to obtain releases of individual lots upon the payment by the plaintiff of \$2,200 per lot to the first mortgagee in reduction of the first mortgage (A-9 to A-47).

After the first mortgage was placed on the property, the plaintiff entered into a contract to sell lots of land, but the defendant bank refused to give the releases required to complete this sale. This put the plaintiff in default under the sales contract and exposed it to a damage suit by the purchaser. It also deprived the plaintiff of the funds needed to go forward with its development.

In an attempt to rescue the development from disaster, the plaintiff brought this suit to obtain the following relief (A-1 to A-8, A-66 to A-71):



- (i) To fix the amount of the credits the plaintiff is entitled to, which the plaintiff claims reduced the principal of the defendant's mortgage to zero;
- (ii) To compel the defendant to grant the releases required to transfer the sold lots and to release additional lots to permit the plaintiff to satisfy a mortgage commitment for \$5,000,000 which it had obtained from Chase Manhattan Bank;
- (iii) To recover damages for the loss suffered by the plaintiff in having its development blocked by the defendant's refusal to deliver releases;
- (iv) To obtain a declaratory judgment on a claim by the defendant bank that its mortgage extended to property acquired after the mortgage closing from persons other than the seller, this "after-acquired" property having been included in the title description in the mortgage but not having been owned by the seller at the time of the closing; and
- (v) To obtain a judgment declaring that interest on the defendant's mortgage need not be paid until after a determination as to whether any

principal is due after application of the credits.

The defendant bank interposed a counterclaim alleging that the plaintiff, its president and the holder of the first mortgage on the property had conspired to diminish the security of the defendant's mortgage and requesting an accounting of the money and benefits derived from various transactions.

After this suit was instituted, a series of events occurred which were beyond the plaintiff's control. The defendant bank used these events to throw the case into a state of procedural chaos which led the District Court Judge to become confused and ultimately irritated to the point where he committed the error of denying the plaintiff's motion for voluntary dismissal. These events were as follows (A-118 to A-123)

- (i) The purchaser of the sold lots sued the plaintiff for breach of contract for failure to deliver the releases withheld by the defendant bank. The withholding of these releases deprived the plaintiff of the funds it needed for continuing the development and gave the plaintiff a cause of action for damages for breach of contract.



- (ii) Chase Manhattan Bank cancelled a mortgage commitment it had given the plaintiff, due to the plaintiff's failure to obtain releases of the property intended to be mortgaged. This also gave the plaintiff a cause of action for damages for breach of contract.
- (iii) The holder of the first mortgage on the property and the broker commenced separate foreclosure proceedings in the New Jersey Superior Court naming the plaintiff and the defendant bank as parties defendant. These actions necessarily involved three of the issues in this suit: the amount due on the defendant bank's mortgage, whether the defendant's mortgage was valid and whether it extended to the after-acquired property. These issues were raised by the defendant bank in its answer in the foreclosure proceeding instituted by the broker and the issues raised by the defendant bank's counterclaim in this action were also raised in that proceeding (A-101 to A-115).
- (v) The plaintiff elected to refuse to pay interest on the defendant bank's mortgage on the ground that no principal or interest

was due after the allowable credits, thereby obviating the plaintiff's need for a declaratory judgment on that issue.

At this juncture, the only issue raised by the complaint in this case which was not either moot or necessary for the resolution of the New Jersey actions against the plaintiff was that of the damages caused by the defendant's refusal to give the mortgage releases, the action which destroyed the plaintiff's development plans, exposed it to damage suits by its lot purchaser, and threw the other mortgages into foreclosure. However, the plaintiff would not be able to prove the nature and extent of its damage until the resolution of the New Jersey actions.

It was for this reason that the plaintiff adopted the court's suggestion of moving for voluntary discontinuance of this action. If its motion had been granted the case would have ended, but the plaintiff would have retained the right to renew it if the facts warranted such action after conclusion of the New Jersey suits.

However, the District Judge denied this motion because the plaintiff refused to agree to discontinuance with prejudice, which would have wiped out its claim for damages. This action on the part of the judge was due almost entirely to his suspicion that the New Jersey lawyers were somehow trying to deprive his court of jurisdiction.



This suspicion arose in the confusing and extensive debate he had with these lawyers as to which issues in the foreclosure proceedings were in rem and which were in personam (A-201 to A-216), but he overlooked the fact that a foreclosure action is procedurally impossible if the court having jurisdiction over the foreclosure is prohibited from determining the validity, the priority of the mortgages involved and the amounts due thereon.

The judge's frustration over what issues were meant to be covered by his restraining order and the accompanying irritation against the New Jersey lawyers carried over to the matter of Mr. Achee's deposition.

This deposition was suspended during the judge's stay of the New York proceeding and was continued by the defendant immediately after the stay was lifted. Thereafter, as stated above, when Mr. Achee was available, the defendant's counsel was not. The deposition was adjourned twice by consent, one of these adjournments being due to the death of Mr. Achee's mother. Shortly after the District Judge had issued his restraining order against the New Jersey Court, Mr. Achee had to go abroad to obtain a commitment for a \$21,000,000 loan needed by C. F. Seabrook Company, of which he was a principal officer and director. The Seabrook Company was in bankruptcy in New Jersey and the funds were needed to rescue the company. He entered into negotiations

with financial institutions in Europe and the Middle East and ultimately obtained the necessary commitment.

At the time the defendant's counsel wanted Mr. Achee for the third session of his deposition, the negotiations were at a critical stage and had he abandoned them at that point, many people, including the creditors and stockholders of Seabrook, would have been seriously and irreparable injured financially. In fact, the Bankruptcy Judge in charge of the Seabrook case issued an order directing Mr. Achee to continue the negotiations (A-243), but Judge Brieant refused to consider the circumstances underlying the order. Instead he charged that he had "been abused" by Mr. Achee and said "he is just not simply going to do it any more." (A-235). Using Mr. Achee's inability to appear as the basis for avoiding the confusion caused by the restraint on the New Jersey Superior Court, he dismissed the plaintiff's action with prejudice.

#### ARGUMENT

##### I.

#### THE PLAINTIFF'S MOTION FOR VOLUNTARY DISCONTINUANCE SHOULD HAVE BEEN GRANTED

The circumstances of this case as they developed were such that the only sensible step was a voluntary dismissal without prejudice under Rule 41(a)(2) of the Federal Rules of Civil Procedure. The plaintiff had not caused the New Jersey foreclosure or the other suits against it. The



defendant bank, by refusing to grant the required releases, had wrecked the plaintiff's development plans and exposed the plaintiff to the New Jersey litigation.

All of the issues in this case except the claim for damages caused by the defendant's refusal to grant the releases were overlapped by the broker's foreclosure proceeding in New Jersey. These issues were the validity of the defendant's mortgage, the amount due on the mortgage, if any, and priority among the mortgages. The defendant bank was itself a party defendant in that proceeding and in its pleadings it raised the same issues as it had in its pleadings in this case, and yet it strenuously objected to having the plaintiff raise these issues in the New Jersey case. Since a foreclosure suit cannot proceed without deciding such issues, Judge Brieant's restraining order threw the New Jersey court and all of the counsel involved into a state of utter confusion. The New Jersey court itself, through the office of the Attorney General of New Jersey, sought clarification. Also, the obvious inequity of forbidding the plaintiff to defend itself in the New Jersey case, while leaving the defendant free to proceed on the same issues, cast serious doubts on the interpretation to be given to the restraining order and its validity.

In trying to unravel this confusion, Judge Brieant, after much debate as to which issues were in rem and which

in personam, suggested that the plaintiff withdraw the New York case without prejudice. This would have let the New Jersey litigation proceed in a normal fashion and would have reserved to the plaintiff its claim for damages based on the defendant bank's refusal to give releases.

Therefore, the plaintiff adopted the court's suggestion and moved for voluntary dismissal under Rule 41(a)(2) which permits the court to impose "such terms and conditions as the court deems proper." Under the rule a dismissal is "without prejudice" unless "otherwise specified in the order." Judge Brieant refused to grant the motion unless the plaintiff agreed to give up its damage claims. This was a wholly unjustified condition in no way called for by the circumstances. The purpose of the proposed voluntary dismissal was to permit the foreclosure proceeding to go forward without being frustrated by the overlapping issues in this case. The overlapping issues did not include the damage claims and there was no basis in law or justice to compel the plaintiff to give them up. Moreover, the defendant would not have been prejudiced by the dismissal as the issues in its counterclaim had also been raised in the foreclosure proceeding.

All of the procedural chaos caused by Judge Brieant's restraining order against the New Jersey court and all of the unnecessary debate as to whether various issues



were in rem or in personam would have been obviated by permitting a voluntary dismissal without prejudice. To impose as a punitive condition that the plaintiff give up its damage claims which were not asserted in the foreclosure proceeding was a breach of judicial discretion. It would not have occurred had not Judge Brieant obtained the erroneous impression that the New Jersey lawyers were trying to "oust this District Court of its jurisdiction" (A-138), a result Judge Brieant said he would not tolerate. (A-138, A-140).

## II.

### THE CIRCUMSTANCES DID NOT WARRANT THE DRASTIC ACTION OF DISMISSAL WITH PREJUDICE

The District Court dismissed this action with prejudice as a means of punishing the plaintiff under Rule 37(b) for Mr. Achee's failure to appear for a deposition and under Rule 41(b) for "failure of the plaintiff to prosecute."

Dismissal of an action with prejudice is the most drastic sanction available to a court and, therefore, should be reserved for the most extreme situations. Paramount consideration must be given to the constitutional right of a party to litigate the merits of his claims or to defend those brought against him. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 357 U.S. 197 (1958); Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908); Hovey v. Elliot, 167 U.S.

409 (1897). The variety of lesser sanctions provided under Rule 37 of the Federal Rules dictate that dismissal be imposed only upon clear evidence of wilful disregard of the orders of the court without substantial justification. Such wilfulness cannot be shown on the record in this action.

Rule 37 is intended to encourage compliance with discovery rules rather than to punish the failure to comply. The provisions of the rule permitting dismissal of an action or the entry of a default judgment must be read in light of the Fifth Amendment safeguards against the deprivation of property without due process of law. In Hovey, the Supreme Court held that it was a denial of due process to punish a party for contempt by striking an answer and entering a default judgment against him. Subsequently, in Hammond, supra, the Supreme Court held that a defendant's failure to produce evidence raised the presumption that the defense asserted lacked merit. However, reaffirming the constitutional protections guaranteed by Hovey, the Court went on to state that the presumption would be rebutted upon a reasonable showing of inability to comply with the court's order. Again in Societe, supra, the Supreme Court established that the mere failure to comply with an order of the court, if excusable, would not justify dismissal of a complaint or the entry of a default judgment.

This court has recently upheld the requirement of wilful disobedience of an order as a predicate to dismissal



under Rule 37(b). In Flaks v. Koege, 504 F.2d 702 (2nd Cir. 1974), this court held that evidence of wilfulness is still required despite the 1970 amendments to Rule 37 eliminating the term "wilful." The court said at page 708:

"The 1970 amendments were intended to authorize the court, where it deemed appropriate, to impose more flexible and softer sanctions for Rule 37 violations than theretofore provided. However, there was no intent to eliminate the wilfulness element when the harsh sanction of the dismissal of a complaint or the striking of an answer was ordered."

Rule 37(b) obliges a court to make "such orders in regard to the failure as are just." To assure that such orders are just, and consonant with the constitutional standards set forth in Hovey and Hammond, supra, the appellate courts give considerable weight to the time allotted by a trial court for a party to comply. Indeed, every effort is made to give a party a second opportunity for compliance. Gill v. Stollow, 240 F.2d 669 (2nd Cir. 1957); Anderson v. Nossner, 438 F.2d 183 (5th Cir. 1971), modified on other grounds, 456 F.2d 835 (1972), cert. denied, 409 U.S. 848 (1972); Dorsey v. Academy Moving and Storage, Inc., 423 F.2d 858 (5th Cir. 1970); Robison v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966); Sapiro v. Hartford Fire Ins. Co., 452 F.2d 215 (7th Cir. 1971); U.S. v. Ross, 37 F.R.D. 566 (D.C.N.Y. 1965); Kraut v. Travelers Ins. Co., 208 F. Supp. 60 (D.C.N.Y. 1962).

Similarly, due process considerations require that dismissal under Rule 41(b) for failure to prosecute be limited to those circumstances where there is so extensive a history of inaction or dilatory conduct on the part of the party seeking relief as to indicate a lack of the desire to prosecute or a flagrant disregard for the orderly processes of the court. Recently, the Fifth Circuit stated the test of the propriety of a dismissal under Rule 41(b) to be whether or not the record reveals "the type of contumacious and vexatious delay occasioned by the wilful disregard of a plaintiff for the orderly procedures of a trial court so as to justify that court's dismissal of the plaintiff's possibly meritorious claims." Connolly v. Papachristed Shipping Ltd., 504 F.2d 917, 920 (5th Cir. 1974).

Like Rule 37, Rule 41 affords a trial court a wide variety of sanctions less severe than dismissal so as to preserve the policy of disposing of claims on the merits. On review of such dismissals, the appellate courts do not uphold the dismissal where there has been no deliberate attempt to thwart the process of the trial court, and the instance of delay giving rise to the dismissal could be remedied by granting plaintiff additional time. Connolly, supra.

In this case, the District Court Judge expressed great impatience over the fact that the case had been pend-



ing for two years. However, he overlooked the fact that the case was placed on the inactive calendar for nine months pending determination by the New Jersey Court of the amount due on the defendant's mortgage. After the case was restored to the active calendar only four months elapsed before the judge dismissed the case for failure to prosecute. During that four months the judge threw the case into procedural confusion by partially restraining the New Jersey foreclosure suit. This gave rise to extensive hearings designed to seek clarification, debates as to what issues were in rem or in personam, claims by the judge that the New Jersey lawyers were seeking to oust his court of jurisdiction and attempts by the plaintiff to withdraw the suit without prejudice to permit the New Jersey proceedings to go forward. It would indeed be difficult to find a case more actively prosecuted during that four-month period. It is not surprising that the judge ran out of patience and welcomed the first opportunity to get it off his calendar.

He could have done so easily and without extreme injustice by letting the plaintiff discontinue the action without prejudice. This he refused to do unless the plaintiff agreed to dismissal with prejudice, a wholly arbitrary condition.

Since the plaintiff could not agree to this, the judge used Mr. Achee's difficult predicament as an excuse for dismissing the case with prejudice. Mr. Achee's depo-

sition was not so vital as to require such drastic action nor was his failure to appear inexcusable. Other executives of the plaintiff were available and the prior delays in the deposition were due partly to the unavailability of the defendant's counsel. There is no indication of any other delaying action by the plaintiff or Mr. Achee.

There was no occasion to direct the court's ire at Mr. Achee or to refuse to listen to the reasons for his absence and inability to return. He had been specifically ordered by the Bankruptcy Judge in New Jersey to continue the financing negotiations and could not return at that critical time without causing great hardship and financial risk. To allow him 96 hours to abandon important negotiations abroad and return for a deposition for which time was not important and which could have been covered by another officer of the plaintiff, and without an opportunity to have the circumstances explained to the court, all on pain of having the case dismissed, was arbitrary in the extreme and deprived the plaintiff of its right to due process of law.

The harshness of the court's punishment becomes even more evident when it is realized that dismissal with prejudice was res adjudicata against the plaintiff with respect to all of the issues in the case, including those which overlap the New Jersey foreclosure proceeding, thus



depriving the plaintiff of its due process rights in that case as well.

The judge's frustration and impatience over the procedural log jam, created in large part by his ambiguous restraining order against the New Jersey Court, is understandable. But the punishment he meted out against the object of his irritation is out of all proportion to the claimed infraction.

CONCLUSION

We respectfully submit that the orders of the District Court denying the plaintiff's motion for voluntary discontinuance without prejudice and dismissing the action with prejudice should be reversed.

Respectfully submitted,

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